Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision	CG Docket No. 18-152
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

THE LEADSCOUNCIL'S REPLY TO COMMENTS OF CRUNCH SAN DIEGO, LLC

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The LeadsCouncil respectfully submits this reply to the comments filed in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") Consumer and Governmental Affairs Bureau in the above-captioned proceedings.[1] The Public Notice seeks comment on a recent Ninth Circuit Court of Appeals panel decision in *Marks v. Crunch San Diego, LLC*[2] interpreting the definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act of 1991 ("TCPA" or "Act").

The LeadsCouncil is a fully-independent alliance of lead generation experts and does not itself run lead generation offers. Its mission is to educate and advocate on behalf of the buyers and sellers engaged in all forms of lead generation, ensuring that all participants deliver value

[1] Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision, Public Notice, CG Docket Nos. 18-152 and 02-278, DA 18-1014 (rel. Oct. 3, 2018) ("Public Notice").
[2] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

and follow ethical as well as federal and state guidelines when conducting their business. The LeadsCouncil establishes guidelines and standards for all lead generators and buyers to follow and serves as an educational and informational resource for the industry. It works to educate its constituency on important trends of lead compliance, measurement and management.

The LeadsCouncil supports the Commission's efforts to help protect consumers from harassing, unwanted phone calls as it seeks to issue guidance on the definition of "automatic telephone dialing system" ("ATDS"). In pursuing those efforts, the Commission should ensure that its regulatory framework and policies are consistent with the TCPA's plain statutory language and Congressional intent. The Commission should apply the balance struck by Congress between consumers' privacy interests and the First Amendment rights of legitimate businesses by limiting the definition of an ATDS to equipment that has the present capacity to operate as a "random or sequential number generator."[3]

The Commission should reject the expansive definition of an ATDS adopted by the Ninth Circuit in favor of the plain language of the statute. In *Marks*, the Ninth Circuit worked backwards to manufacture ambiguity in the TCPA's definition of an ATDS that simply is not there. In doing so, the Ninth Circuit turned statutory construction on its head. Rather than beginning its analysis with the language of the statute, the court started with a long discussion of the legislative history in an attempt to discern Congressional intent.[4] Relying on statements from the Congressional record addressing automated calls using prerecorded messages, the court concluded that "Congress was attempting to alleviate a particular problem–an increasing number of automated and prerecorded calls to certain categories of numbers, and therefore Congress

[3] 47 U.S.C. § 227(a)(1).
[4] *Marks*, 2018 WL 4495553 at *1-3 (quotations omitted).

intended to prohibit the use of any device that had the basic function of being automatic, i.e., had 'the capacity to dial numbers without human intervention.'" [5]

After divining the intent of the TCPA, and without offering any explanation or reasoning, the Ninth Circuit simply declared: "After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face."[6] Essentially, the court looked at the plain language of the definition of an ATDS, realized the language of the statute does not accomplish the purported Congressional goal the Ninth Circuit had attributed to Congress, and concluded that the ATDS definition, therefore, must be ambiguous.[7]

LeadsCouncil encourages the Commission to reject the backward reasoning of the Ninth Circuit and instead start with the actual text of the TCPA. The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[8] As demonstrated in the Comment submitted by Crunch San Diego, LLC, a careful and grammatically correct reading of the language of the ATDS definition leads to only one conclusion, there is no ambiguity in this definition. Courts around the country, *including the Ninth Circuit*, have previously found the ATDS definition to be "clear and unambiguous."[9] The equipment must be able to store or produce numbers that have been generated randomly or sequentially.

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[5] *Marks*, at *4 (quoting 2003 Order at 14,092).
[6] *Marks*, at *8.
[7] *Id.*
[8] 47 U.S.C. § 227(a)(1).
[9] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (noting "the statute's clear language" and reading the phrase "to store or produce telephone numbers to be called, using a random of sequential number generator" to mean "store, produce, or call randomly or sequentially generated telephone numbers").

The phrase "using a random or sequential number generator" makes clear that the TCPA was targeted at a specific type of equipment that was in use in 1990.[10] Even the Ninth Circuit acknowledge this fact: "the automated telemarketing devices prevalent in the early 1990s [] dialed a random or sequential block of numbers."[11]

Although LeadsCouncil urges the Commission to interpret that definition of an ATDS to be limited to equipment that has the present capacity to act as a random or sequential number generator, if the Commission finds that the statute is ambiguous, the Commission should reject the expansive definition adopted by the Ninth Circuit. As the Commission stated in its Public Notice, the "*ACA* court…held that the TCPA unambiguously foreclosed any interpretation that 'would appear to subject ordinary calls from any conventional smartphone to the Act's coverage.'"[12] But that is precisely what the *Marks* decision does. By expansively construing ATDS as "not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includ[ing] devices with the capacity to store numbers and to dial stored numbers automatically,"[13] the Ninth Circuit effectively rewrote the TCPA to expand potential liability to subscribers and users of over 300 million smartphones. All smartphones have the capacity to dial from a stored list of numbers, such as a personal phone book or even a contacts list. All smartphones have the capacity to send group text messages. As a result, *Marks* directly conflicts with the D.C. Circuit's decision in *ACA Int'l.*

As the Comments submitted by the TCPA plaintiffs' bar acknowledge, the expansive definition proposed in *Marks* would make every smart phone an ATDS. Every smart phone has

[10] 47 U.S.C. § 227(a)(1)
[11] *Marks*, 2018 WL 4495553, at *3 (quoting Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014, 14,090 (2003) ("2003 Order").
[12] Public Notice, p. 2 *quoting ACA Int'l*, 885 F.3d at 692.
[13] *Marks*, 2018 WL 4495533, at *9.

the present capacity to send a group text. Group text messages selling Girl Scout cookies or raffle tickets would incur statutory penalties of $500 per text message. Not only that, every sales call using a smart phone, even if the individual manually dialed the number would subject the caller to statutory penalties. The TCPA prohibits "any call…using an automatic telephone dialing system," *i.e.*, any call using a phone that has the capacity to send a group text. Subjecting the approximately 77% of the American population[14] that owns smart phones to TCPA liability that enriches the plaintiffs' bar and serial TCPA litigants was certainly not Congress's intent in enacting the TCPA. If that had been the case, Congress would have simply prohibited all telephone solicitations without the prior express consent of the consumer regardless of the equipment used.

It is not for the Ninth Circuit to change the language of the TCPA to achieve its own goals or the purported goals of a few Congressional speakers. As the Congressional Statement of Findings makes clear, "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade ***must be balanced*** in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[15] The balance struck by Congress was to create liability for calls made using an ATDS, which it defined as equipment "using a random or sequential number generator." If Congress wishes to revisit the definition of an ATDS to expand it to include equipment that can dial numbers from a stored list, including all smartphones, Congress can do so. In fact, legislation has been introduced by Congress that would do just

[14] Aaron Smith, *Record shares of Americans now own smartphones, have home broadband*, available at http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/ (last visited October 22, 2018).
[15] Section 2 of Pub.L. 102-243(9) (emphasis added).

that.[16] However, until Congress amends the language of the statute, the Commission should apply the TCPA as written.[17]

The LeadsCouncil therefore supports the comments previously submitted encouraging the FCC to provide both businesses and consumers alike with regulatory certainty by interpreting the TCPA's definition of ATDS consistent with *ACA International*.

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Respectfully submitted,

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[16] *See* draft of *Stopping Bad Robocalls Act* available at https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Pallone.pdf

[17] *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted).